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## Unconstitutional Regulatory Seizures under the Federal Deposit Insurance Corporation Improvement Act of 1991: The Final Blow to the Business of National Banks

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# **Unconstitutional Regulatory Seizures Under the Federal Deposit Insurance Corporation Improvement Act of 1991: The Final Blow to the Business of National Banks**

## **I. INTRODUCTION**

On Friday morning, April 30, 1993, employees of American Commerce National Bank in Anaheim, California arrived for work in typical fashion. Unbeknownst to them, by the end of the day, they would work not for the bank, but instead for the Federal Deposit Insurance Corporation ("FDIC").<sup>1</sup> At three o'clock that afternoon, federal agents, including members of the federal Secret Service and the Federal Bureau of Investigation, along with local police officers, some brandishing weapons, seized the financial institution by force.<sup>2</sup> On the following Monday morning,<sup>3</sup> a banner outside the building covering the old American Commerce National Bank sign<sup>4</sup> read, "Southern California Bank."<sup>5</sup>

On the surface it appears that the story of American Commerce Na-

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1. On April 30, 1993, the Office of the Comptroller of the Currency ("OCC") appointed the FDIC as sole receiver for American Commerce National Bank. See James S. Granelli, *U.S. Seizes Anaheim's American Commerce Bank*, L.A. TIMES, May 1, 1993, at D3 (Orange County ed.).

2. After the seizure, bank regulators locked all the bank's doors and stationed armed guards at each point of ingress or egress. Regulators allegedly destroyed anything symbolic of the bank, including personal photos. In one instance, a regulator allegedly ripped the picture of a bank director's five-year-old daughter, throwing it into the trash while commenting, "this isn't needed anymore." See Complaint for Plaintiffs at 28, *Garner v. Blake*, No. CV 93-6674 MRP (C.D. Cal. Dec. 8, 1993).

3. On Monday, an article in the Los Angeles Times stated: "Federal banking regulators, exercising for the first time new powers to seize financially healthy banks, took over American Commerce National Bank on Friday and accused its operators of concealing records, lying and wasting the bank's finances." Granelli, *supra* note 1, at D2.

4. The FDIC sold \$107,000,000 in American Commerce National Bank assets, along with other assets such as the actual building and inside fixtures, to Southern California Bank for \$110,000. See Ted Johnson, *New Owner Will Reopen Seized Bank*, L.A. TIMES, May 3, 1993, at D1 (Orange County ed.).

5. *Id.*

tional Bank exemplifies just one of the many bank failures in the 1980s and 90s.<sup>6</sup> Simply lumping this bank into the category of common bank failures, however, would be an unfortunate oversight. While the media coverage of the April 30, 1993 takeover focused primarily on the board of directors and top employees of American Commerce National Bank,<sup>7</sup> the newspapers ignored a fundamental issue accompanying the seizure: that it violated the United States Constitution.

The Office of the Comptroller of the Currency ("OCC") seized the bank under federal legislation, known as the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), that took effect December 19, 1992.<sup>8</sup> This was the first time that banking regulators used the new legislation to seize a solvent national bank.<sup>9</sup>

Faced with an impending bank crisis that depleted billions of taxpayers' dollars, Congress passed FDICIA<sup>10</sup> to prevent banks from reaching extreme levels of insolvency.<sup>11</sup> In so doing Congress hoped to strengthen the regulation of financial institutions<sup>12</sup> by granting federal regulators the authority to intervene<sup>13</sup> in the affairs of national banks significantly earlier than previous powers had permitted.<sup>14</sup>

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6. During the first six months of 1992, 61 banks with \$19.9 billion in assets failed. In 1993, for the same six month period, 22 banks with \$2.7 billion in assets failed. *See generally* Mark Glover, *Did Any Escape Waco Inferno?*, SACRAMENTO BEE, July 5, 1993, at B1. Recapturing this money has been virtually impossible for the various government agencies. "Although the S&L disaster is costing U.S. taxpayers an estimated \$180 billion, the [Resolution Trust Corporation ("RTC")] has had surprisingly little success in squeezing any money out of many of the executives who ran the thrifts." Albert R. Karr, *RTC Chases Billions From Failed Thrifts, But Nets Small Change*, WALL ST. J., Sept. 2, 1994, at A1.

7. In his article on the savings and loan crisis, Lawrence White explained: "The savings-and-loan ("S & L") debacle is in many ways an awful story - awful in both senses of that word. But it is a story that has not been well reported in the press or media, because the media focus is on anecdotes and personalities." Lawrence J. White, *The S&L Debacle*, 59 FORDHAM L. REV. S57, S57 (1991).

8. Pub. L. No. 102-242, 105 Stat. 2236 (1991). The regulators seized American Commerce National Bank specifically under 12 U.S.C. § 191. *See generally* 12 U.S.C. § 191 (1993).

9. *See* Johnson, *supra* note 4, at D1.

10. *See* Pub. L. No. 102-242, 1991 U.S.C.A.N. (105 Stat.) 2236.

11. *See generally* ACUS Calls for Bank Exam Appeals Process and Judicial Review of Agency Decisions, BNA BANKING DAILY, June 22, 1993.

12. In her article on the banking industry, Sarah Hughes explained: "FDICIA's principal aims were to recapitalize the Bank Insurance Fund, to protect the integrity of the deposit insurance funds, and to protect the taxpayer from further bailouts of those funds." Sarah Jane Hughes, *Banking and Deposit Insurance: An Unfinished Agenda for the 1990s*, 68 IND. L.J. 835, 837-38 (1993).

13. In *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993), the court noted: "Much of the history of the savings and loan . . . industry consists of financial crisis followed by regulatory response." *Id.* at 800.

14. In a speech addressing a seminar on FDICIA, Edward W. Kelley, Jr., a member

Under FDICIA, a bank need not be in a dire economic state to warrant federal action. Rather, the OCC has sole discretion to evaluate a bank's individual status.<sup>16</sup> The purpose behind such policies is to prevent the deposit insurance system<sup>16</sup> from incurring significant losses.<sup>17</sup> A primary concern of FDICIA<sup>18</sup> is to prevent insolvent banks from be-

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of the Federal Reserve Board of Governors, stated:

There was a view held by many people that supervisors of insured depository institutions were sometimes too slow in getting going, in identifying troubled institutions, and were inclined to exercise too much forbearance in working with the institutions that were developing serious problems.

It was concluded that on occasion steps weren't being taken very promptly to address deficiencies so that problems were being allowed to fester and dividends, for instance, were not being promptly curtailed, and cost-cutting and other remedial actions were not being adequately pursued.

Edward Kelley, Address at a Georgetown University Law Center Seminar on the Federal Deposit Insurance Corporation Improvement Act of 1991 (Nov. 12, 1992) (transcript available in The Reuter Transcript Report).

15. See 12 U.S.C. § 191 (1993). In her article on the savings and loan crisis, Mollie Dickenson stated:

Government regulators have approached the so-called S&L crisis as if widespread criminality applied to anyone with a pocket calculator. In the process, it has seized hundreds of failing thrifts whose assets might have been preserved through sales and mergers. It has deemed "insolvent" some 500 salvageable S&Ls, seizing them under interpretations of law Congress passed to resolve the thrift crisis.

Mollie Dickenson, *The Real S&L Scandal*, WORTH, Sept. 1994, at 93, 95.

16. The deposit insurance system guarantees the necessary funds that allow the FDIC to protect each depositor of member banks up to \$100,000. 12 U.S.C. § 1821(a)(1)(B) (1993).

17. The Senate Committee on Banking, Housing and Urban Affairs explained:

The Committee is concerned that, without reform of the deposit insurance system and the bank regulatory system, deposit insurance losses will continue to mount. Accordingly, [FDICIA] makes fundamental changes in the way banks are regulated. These changes will force regulators to take prompt corrective action when an institution first experiences trouble and enable regulators to take control of failing institutions before they run up losses to the insurance fund.

S. REP. No. 167, 102d Cong., 1st Sess., pt. A (1991).

18. In signing FDICIA, President George Bush explained:

Unfortunately, the narrow legislation produced by the Congress does little more than provide critical funding to the Bank Insurance Fund. While it includes some of the regulatory reforms . . . it does nothing to restore the competitiveness of the banking industry. . . . This shortsighted congressional response to the problems we face increases taxpayer exposure to bank losses.

coming an excessive drain on the FDIC.<sup>19</sup> In an effort to achieve this, Congress provided federal banking regulators an avenue by which they could seize solvent banks which are not in immediate risk of insolvency.<sup>20</sup>

While public policy dictates the need to mitigate the effects of the current banking crisis, FDICIA is not the answer.<sup>21</sup> Under FDICIA, Congress has unmistakably violated the constitutional protections of solvent, and to a lesser degree, insolvent financial institutions.<sup>22</sup> FDICIA directly conflicts with two fundamental constitutional provisions afforded to national banks: the Takings Clause<sup>23</sup> and procedural due process<sup>24</sup> requirements.

Part II of this Comment provides a historical background and discussion of the traditional regulation of financial institutions, tracing the evolution of FDICIA.<sup>25</sup>

Part III discusses the unconstitutionality of FDICIA in two distinct areas.<sup>26</sup> First, FDICIA as it applies to solvent banks is a direct violation

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Statement by President George Bush upon signing S. 543, 27 WEEKLY COMP. PRES. DOC. 1873 (Dec. 23, 1991).

19. The Banking Act of 1933, ch. 89, 48 stat. 162 (codified as amended in 12 U.S.C. §§ 24, 1811 and other scattered sections of 12 U.S.C.), established the FDIC, providing the federal government with a vehicle with which it could insure qualified banks. Originally, the government offered insurance only to members of the Federal Reserve System, but it has long since provided the same insurance opportunity to non-member state banks. The deposit insurance must be maintained in order for the system of government-insured financial institutions to exist. *See generally* EDWARD L. SYMONS, JR. AND JAMES J. WHITE, *BANKING LAW* 41 (2d ed. 1984).

20. *See* 12 U.S.C. § 191 (1993).

21. One commentator noted:

The FDICIA not only reflects the dominance of deposit insurance in federal banking regulation, but also Congress's inability to enact structural banking reforms that would increase opportunities for banks to compete profitably with other financial service providers. To the extent Congress failed to include structural banking reforms in the FDICIA, it merely postponed action necessary for the future health of the banking industry and, ultimately, for the integrity of the deposit insurance funds.

Hughes, *supra* note 12, at 836.

22. One legal scholar stated: "The past five years have witnessed the most sweeping banking regulation since the worldwide banking collapse of the 1930s. The result is a Byzantine regulatory structure of interrelated statutes, some with truly Draconian provisions, whose ultimate effect upon capital markets is as yet unknown." Patrick Crawford, Note, *Inefficiency and Abuse of Process in Banking Regulation: Asset Seizures, Law Firms, and the Ricoization of Banking Law*, 79 VA. L. REV. 205, 205-06 (1993) (footnotes omitted).

23. U.S. CONST. amend. V.

24. U.S. CONST. amend. XIV.

25. *See infra* notes 36-81 and accompanying text.

26. *See infra* notes 82-214 and accompanying text.

of the Takings Clause of the United States Constitution.<sup>27</sup> Second, Title 12 of the United States Code, Section 191<sup>28</sup> violates due process requirements<sup>29</sup> since it provides no notice or opportunity for a hearing when the FDIC is appointed receiver for solvent institutions.<sup>30</sup> Section 191 grants the OCC exclusive authority to appoint the FDIC as receiver for any bank under the parameters of several discretionary factors,<sup>31</sup> all without notice or a hearing.<sup>32</sup>

Part IV describes the arbitrary and capricious standard of review that applies to regulatory takeovers by federal agencies.<sup>33</sup> The seizure of American Commerce National Bank typifies the unconstitutional nature of FDICIA by the OCC's abuse of power under 12 U.S.C. § 191.<sup>34</sup> FDICIA grants the OCC authority to seize banks without any constitutional safeguards. Thus, the arbitrary and capricious standard inherently lends itself to abuse, while the OCC remains virtually outside the realm of judicial scrutiny.<sup>35</sup>

27. U.S. CONST. amend. V.

28. This section states, in relevant part:

§ 191. Appointment of Federal Deposit Insurance Corporation as Receiver.

The Comptroller of the Currency may, *without prior notice or hearings*, appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank . . . ) if the Comptroller determines, in the Comptroller's discretion, that

(1) 1 or more of the grounds specified in section 1821(c)(5) of this title exist . . . .

12 U.S.C. § 191 (1993) (emphasis added).

29. U.S. CONST. amend XIV.

30. See 12 U.S.C. § 191 (1993).

31. See *infra* note 49 for a list of these discretionary factors.

32. 12 U.S.C. § 191 (1993).

33. See *infra* notes 215-37 and accompanying text.

34. See *infra* notes 215-37 and accompanying text.

35. When reversing the decision of a government agency, including the OCC, courts are held to the arbitrary and capricious standard of review. See *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1142 (10th Cir. 1991) (holding a receivership appointment to an arbitrary and capricious standard of review), *cert. denied*, 112 S. Ct. 1475 (1992); *Syracuse Peace Council v. Federal Communications Comm'n*, 867 F.2d 654, 657 (D.C. Cir. 1989) (holding the Federal Communications Commission to an arbitrary and capricious standard of review), *cert. denied*, 493 U.S. 1019 (1990); *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1406 (5th Cir. 1987) (holding that a receiver may be appointed under the proper arbitrary and capricious standard of review), *cert. denied*, 485 U.S. 959 (1988); *Gregory v. Mitchell*, 459 F. Supp. 1162, 1166 (N.D. Ala. 1978) (holding that the State Banking Board was held to an arbitrary and capricious standard of review). See generally *Dickenson, supra*

## II. BACKGROUND

On December 19, 1991, Congress passed FDICIA.<sup>36</sup> The Act was a direct congressional response to the frustrating problems of federal deposit insurance.<sup>37</sup>

The increase in bank failures in the last two decades<sup>38</sup> has resulted in a significant drain upon the Bank Insurance Fund ("BIF"). Since the FDIC<sup>39</sup> insures both commercial banks and savings and loans, the BIF is the portion of FDIC funds designated to protect the banks and bank depositors in the event of insolvency or other financial misfortune.<sup>40</sup> By insuring these institutions,<sup>41</sup> the FDIC minimizes the concern of bank runs.<sup>42</sup> But if the BIF can no longer cover failed institutions, the threat of panicked depositors may once again return to the nation's banking industry.<sup>43</sup>

FDICIA comes only two years after the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").<sup>44</sup> In the 1980s,

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note 15.

36. Pub. L. No. 102-242, 105 Stat. 22336 (1991). The goal of FDICIA is as follows: "By systemically reforming the banking regulatory scheme, FDICIA attempts to minimize the losses taxpayers incur when the Bank Insurance Fund ("BIF") has insufficient capital to finance a bank failure." Jamie C. Mann & Barbara J. Ellis, *Developments in Banking Law*, 12 ANN. REV. BANKING L. 1 (1992).

37. Prior to FDICIA, the Federal Savings and Loan Insurance Corporation ("FSLIC") failed, along with myriad institutions insured by FSLIC, costing taxpayers approximately \$200 billion. See generally Richard S. Carnell, *Prompt Corrective Action Under the FDIC Improvement Act of 1991*, PLI COMM. L. & PRACTICE COURSE HANDBOOK SERIES NO. 625/27 (1992).

38. Pub. L. No. 102-242, 1991 U.S.C.A.N. (105 Stat.) 1905. "During the 1970s, only 76 banks failed, compared to nearly 1000 in the 1980s. Between 1943 and 1981 the greatest number of banks that failed in any one year was 17 (1976). In 1988, 221 banks failed." *Id.*

39. Historically, the FSLIC insured savings and loans while the FDIC insured member commercial banks. Now, the FDIC insures both. See generally SYMONS & WHITE, *supra* note 19.

40. A major tool of banking reform in the 1930s was the Banking Act of 1933 (also known as "Glass-Steagall"). The Act separated commercial from investment banking while establishing federal deposit insurance. See Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 24, 1811 and other scattered sections of 12 U.S.C.). See generally Crawford, *supra* note 22, at 205 n.4.

41. The Federal Reserve Act in June of 1933 established the FDIC, which insured bank deposits beginning in 1934. See generally Crawford, *supra* note 22, at 205 n.4.

42. See generally Carnell, *supra* note 37.

43. In the event of a truly catastrophic series of banks failures, the BIF could never completely insure all depositors. See SYMONS & WHITE, *supra* note 19, at 708.

44. Pub. L. No. 101-73, 103 Stat. 183 (1989). Congress, in passing FIRREA, encouraged the banking agencies to "aggressively utilize this new authority." H.R. Rep. No. 101-222, 101st Cong., 1st Sess. 440 (1989). For a further discussion on FIRREA, see Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the*

Congress altered the entire regulatory structure through FIRREA, and "[p]rofessionals active in the banking industry were surprised by the extensive powers, prerogatives and perquisites given federal banking regulators."<sup>45</sup> FIRREA significantly changed the nature of the banking industry, and left the door wide open for FDICIA.<sup>46</sup> Both acts vest substantial authority in bank regulators while arguably usurping individual bank autonomy.<sup>47</sup>

In 1991, Congress passed FDICIA, which substantially modified the text of section 191, the receivership section, of Title 12.<sup>48</sup> Section 191 now states:

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*Enforcement Process of Federal Bank Regulation*, 50 OHIO ST. L.J. 1117 (1989). For an expanded discussion on regulatory implementation of FIRREA, see Dickenson, *supra* note 15.

45. Charles L. O'Brien & Lisa M. Cavage, *FIRREA: Retroactive Application, Due Process Issues, Right-Duty Analysis and the Statute of Limitations*, 108 BANKING L.J. 308, 308 (1991).

46. O'Brien and Cavage further noted:

FIRREA, which was introduced to correct the managerial excesses of the 1980s, may produce regulatory excesses for the 1990s. The statute was expressly designed to 'strengthen the enforcement powers of [f]ederal regulators of depository institutions' and to 'strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.'

*Id.* (quoting 12 U.S.C. §§ 101(9), 101(10)).

47. "Some bank regulators are now enthusiastically testing the limits of these new and expanded powers. . . . As a result, directors and officers of banks . . . may soon be the targets of investigations and prosecutions for actions that in the context of day-to-day bank management, were well intentioned and appropriate." *Id.* For a detailed discussion of several egregious regulatory takeovers, see Dickenson, *supra* note 15. In her article, Dickenson discusses at length several bank seizures and the personal stories behind the institutions. *Id.*

48. See 12 U.S.C. § 191 (1993). Senator Donald Riegle made the following statements at a Senate Banking Committee hearing regarding FDICIA:

On December 19, [1992] the FDIC will implement a new statutory mandate, a new law enacted in last year's banking reform bill, that requires regulators to take prompt corrective action to resolve the problems of failing banks . . . . [T]hese reforms were designed to protect America's taxpayers against further losses to the Federal Deposit Insurance System . . . . However, many seasoned and reputable observers disagree sharply about the extent of the bank problems and what the cost of pending bank failures will be to the FDIC in the period after December 19th.

*Possible Bank Closings in December of 1992: Hearings Before the Committee on Banking and Finance*, 102d Cong., 2d Sess. (1992) (statement by Senator Donald Riegle).



The Comptroller of the Currency may, *without prior notice or hearings*, appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank . . . ) if the Comptroller determines, in the Comptroller's discretion, that (1) 1 or more of the grounds specified in section 1821(c)(5) of this title exist.<sup>49</sup>

This Comment argues that 12 U.S.C. § 191 is unconstitutional.<sup>50</sup> To explain this position, a comparison must be made between the old provisions of title 12 and the new sections under FDICIA.

Prior to the 1991 amendments, Section 191 read as follows:

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title . . . <sup>51</sup> or whenever the comptroller shall become satisfied of the insolvency of

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49. 12 U.S.C. § 191 (1993) (emphasis added). Section 1821(c)(5) states, in pertinent part:

(5) Grounds for appointing conservator or receiver

The grounds for appointing a conservator or receiver . . . for any insured depository institution are as follows:

. . .

[B] Substantial dissipation

Substantial dissipation of assets or earnings due to - -

(i) any violation of any statute or regulation; or

(ii) any unsafe or unsound practice . . .

[C] Unsafe or unsound condition

An unsafe or unsound condition to transact business . . .

[D] Cease and desist orders

Any willful violation of a cease-and-desist order which has become final . . .

[E] Concealment

Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking agency . . .

. . .

[H] Violations of law

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to

(i) cause insolvency or substantial dissipation of assets or earnings;

(ii) weaken the institution's condition; or

(iii) otherwise seriously prejudice the institution's depositors or the deposit insurance fund.

12 U.S.C. § 1821(c)(5) (1993).

50. For a full discussion, see *infra* notes 82-214 and accompanying text.

51. Section 93 remains substantially unchanged and states in pertinent part:

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers . . . to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. *Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose* by the Comptroller of the Currency.

a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.<sup>62</sup>

Section 191 previously applied both to violations of the banking code under section 93, and bank insolvency.<sup>63</sup> Section 93, pertaining to violations, affords sufficient procedural due process by requiring that such decisions under section 191 "be determined and adjudged by a proper district or Territorial court."<sup>64</sup> FDICIA, conversely, permits the appointment of a receiver "without prior notice or hearings"<sup>65</sup> when the Comptroller of the Currency decides, at his discretion,<sup>66</sup> that the bank in question has violated a particular provision of section 1821(c)(5).<sup>67</sup>

Historically, section 1821(c)(5)<sup>68</sup> gave no hint of the broad authority established under FDICIA.<sup>69</sup> Prior to the enactment of FDICIA, section 1821(c)(5) applied specifically to "the appointment of the [FDIC] as . . . receiver for any *insured State depository institution*."<sup>70</sup> The logic behind this statute is sound. When a receiver is appointed for a state bank, such appointment is done according to state law,<sup>71</sup> but the FDIC still insures the depositors of those FDIC insured banks. Therefore, it is in the interest of the FDIC to control the receivership to mitigate against the drain on the insurance fund. There is nothing inherently unconstitutional in this form of receivership, assuming that adequate protections are in place under existing state law.<sup>72</sup>

It is important to note that under the old statutes the Comptroller of the Currency does not make any decisions on his own, but instead coop-

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12 U.S.C. § 93 (1990), *amended by* 12 U.S.C. § 93 (1993) (emphasis added) (current version applies specifically to civil money penalties and liability of bank directors).

52. 12 U.S.C. § 191 (1990), *amended by* 12 U.S.C. § 191 (1993).

53. *Id.*

54. 12 U.S.C. § 93(a) (1993).

55. 12 U.S.C. § 191 (1993).

56. *Id.* This discretion carries with it the seemingly insurmountable arbitrary and capricious standard of review. *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1142 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

57. 12 U.S.C. § 1821(c)(5) (1993).

58. *See supra* note 49, for full text.

59. 12 U.S.C. 1821(c)(5) (1991), *amended by* 12 U.S.C. 1821(c)(5) (1993).

60. *Id.* (emphasis added).

61. For example, the California Finance Code § 3110 states, in pertinent part: "The superintendent may, *with the approval of the court* and of the superintendent, sell any part or the whole business of the bank to any other bank." CAL. FIN. CODE § 3110.1(a) (West 1993) (emphasis added). *See also infra* note 65 for other state statutes.

62. *See supra* notes 59-61 and accompanying text.

erates in conjunction with the individual state authority to decide when to appoint the receiver.<sup>63</sup> The FDIC only becomes involved after such state authority renders its decision upon consultation with appropriate authorities.<sup>64</sup> Furthermore, the decision to appoint a receiver, at the point in which the FDIC takes control, has already survived the procedural scrutiny afforded by the various state constitutions and respective statutes.<sup>65</sup>

After FDICIA, the amended version of section 1821(c)(5) states: "The grounds for appointing a conservator or receiver (which may be the Corporation) *for any insured depository institution* are as follows . . . ."<sup>66</sup> Previously, the protections inherent in section 1821(c)(5) were the various state provisions for notice and a hearing.<sup>67</sup> Under FDICIA, section 1821(c)(5), coupled with the triggering provision of section 191, affords no procedural protection. The state review process

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63. Under the old provisions of § 1821(c)(4), the FDIC could appoint itself sole receiver of any insured state bank if a violation under § 1821(c)(5) existed "at the time - (I) the . . . receiver . . . was appointed; or (II) such institution was closed . . . or . . . at any time (I) during the appointment of the . . . receiver . . . or (II) while such institution is closed." 12 U.S.C. § 1821(c)(4) (1991). However, § 1821(c)(9)(A) states: "The appropriate Federal banking agency may appoint the [FDIC] as sole receiver . . . of any insured State depository institution, after consultation with the appropriate State supervisor . . . " if the appropriate provisions are triggered. 12 U.S.C. § 1821(c)(9)(A) (1991), *amended by* 12 U.S.C. § 1821(c)(9)(A) (1993). Thus, under the old provisions, the OCC had some input regarding state receiverships but not sole discretion.

64. *See* 12 U.S.C. § 1821(c)(9)(A) (1991), *amended by* 12 U.S.C. § 1821(c)(9)(A) (1993).

65. *See supra* note 61 for the applicable California statute. Several states also have similar provisions. ARIZ. REV. STAT. ANN. § 6-395 (1993), states in pertinent part: "If the status of a bank as an insured bank is terminated by the [FDIC] the superintendent may immediately take possession and control of the bank *and in such event shall, through the attorney general, apply to the superior court for the appointment of a receiver for the bank.*" *Id.* (emphasis added). DEL. CODE ANN. tit. 5, § 1709 (1992), states in pertinent part: "The Attorney General, on notice by the State Bank Commissioner, shall institute . . . [receivership] proceedings against the [bank] *by due process of law.*" *Id.* (emphasis added). KAN. STAT. ANN. § 9-1301 (1992), provides that the State Commissioner revoke the license of a bank "after a hearing or an opportunity for a hearing has been given to such bank." *Id.* According to MICH. COMP. LAWS ANN. § 487.551 (West 1993), the State Commissioner, in order to appoint a receiver for any State bank, "shall apply to the circuit court for the county in which the bank is located for the appointment of a receiver for the bank." *Id.* Finally, the V.I. CODE ANN. tit. 9, § 151 (1992), provides that the Banking Board "shall apply to the District Court for the appointment of a receiver." *Id.*

66. 12 U.S.C. § 1821(c)(5) (1993) (emphasis added). Note that the section now applies "for any insured" bank, as opposed to the old language stating "for any insured State" bank.

67. *See supra* notes 63 and 65.

previously applicable under 1821(c)(5) is now eliminated.<sup>68</sup> Therefore, federal banks are subject to the sole discretion of the Comptroller of the Currency,<sup>69</sup> who takes his authority from a statute which previously applied only to state banks and that inherently provided for procedural due process.<sup>70</sup>

Section 1821(c)(7) provided one additional safeguard when the FDIC appointed itself receiver under sections 1821(c)(4) and 1821(c)(5). Section 1821(c)(7) states: "If the [FDIC] appoints itself as . . . receiver under paragraph (4), the insured State depository institution may . . . bring an action in the United States district court . . . for the District of Columbia, for an order requiring the [FDIC] to remove itself as such . . . receiver."<sup>71</sup> This section ensured that all banks subject to receiverships obtained adequate procedural protection.<sup>72</sup> FDICIA eliminated these constitutional safeguards.<sup>73</sup>

The responsibility of enforcing FDICIA with respect to national banks rests primarily with the OCC.<sup>74</sup> In administering congressional intent,<sup>75</sup> the OCC enjoys substantial legal immunity, and "[c]ourts have . . . generally accorded a high degree of deference to the Comptroller's deci-

68. See 12 U.S.C. § 191 (1993).

69. See *infra* notes 215-37 and accompanying text for a discussion of the arbitrary and capricious standard to which the OCC is held.

70. See *supra* note 63.

71. 12 U.S.C. § 1821(c)(7) (1991).

72. *Id.*

73. See 12 U.S.C. § 191 (1993).

74. In *THE REGULATION OF BANKING*, Michael Malloy explained:

The Comptroller, no longer concerned with the issuance of currency by national banks, now functions as the administrator of national banks chartered by him under the National Bank Act. He and his staff constitute a bureau of the Department of the Treasury, and they are responsible for the administration of virtually all federal laws applicable to national banks.

MICHAEL MALLOY, *THE REGULATION OF BANKING* 62 (1992).

75. The Comptroller explained:

The OCC has several tools available to carry out its supervisory responsibilities, and Congress has given the agency broad discretion in the use of these tools . . . . The more commonly used actions vary in severity, ranging from the least severe commitment letters to cease and desist orders. The OCC also has the authority to impose civil money penalties and to order the removal of bank officers and directors. Finally, in appropriate circumstances, it can revoke a bank's charter.

*Id.* at 722.

sions."<sup>76</sup>

There are limits, however, to the OCC's decision-making authority. In *Camp v. Pitts*,<sup>77</sup> the Supreme Court held that the proper standard of review for the Comptroller was arbitrary, capricious, and outside the realm of the law.<sup>78</sup> Furthermore, in *Association of Data Processing Service Organizations v. Camp*,<sup>79</sup> the Supreme Court found "no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks."<sup>80</sup>

In legislating the provisions of FDICIA, the Senate Committee on Banking, Housing and Urban Affairs criticized the OCC's inept control of the banking crisis.<sup>81</sup> Taking the hint, the OCC apparently has launched a veritable crusade to re-regulate the banking industry and strictly enforce the FDICIA. Part IV of this Comment addresses the actions of the OCC in enforcing the provisions of the FDICIA.

### III. 12 U.S.C. SECTION 191 IS UNCONSTITUTIONAL

#### A. Takings Clause

The Takings Clause states, in pertinent part: "[N]or shall private property be taken for public use, without just compensation."<sup>82</sup> Under 12 U.S.C. § 191,<sup>83</sup> the OCC may appoint a receiver for a national bank. Regarding solvent financial institutions, this is tantamount to an unconstitutional taking.

Traditionally, the appointment of a receiver applied primarily to insolvent institutions.<sup>84</sup> After the 1991 amendments,<sup>85</sup> however, solvent

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76. *Id.* at 62.

77. 411 U.S. 138 (1973).

78. *Id.* at 142.

79. 397 U.S. 150 (1970).

80. *Id.* at 157.

81. The Senate Committee noted it was "concerned that regulators have too often delayed in resolving the problems of troubled institutions. Numerous witnesses before the Committee identified such delay as a significant factor in the problems of both the thrift and commercial banking industries and recommended adoption of legislation to encourage prompt corrective action." S. Rep. No. 167, 102d Cong., 1st Sess. (1991).

82. U.S. CONST. amend. V.

83. 12 U.S.C. § 191 states, in pertinent part: "The Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank . . . if the Comptroller determines . . . (1) 1 or more of the grounds specified in section 1821(c)(5) of this title exist." 12 U.S.C. § 191 (1993).

84. See 12 U.S.C. § 191 (1990), amended by 12 U.S.C. § 191 (1993).

85. 12 U.S.C. § 191 (1993).

banks were just as vulnerable to receiverships as insolvent banks.<sup>86</sup> Prior to the enactment of the FDICIA, title 12 of the United States Code authorized federal regulators to seize insolvent banks.<sup>87</sup> Because regulators can now seize solvent banks under legislation that historically applied only to insolvent banks, such authority constitutes a taking of property without just compensation, and hence is a direct violation of the Takings Clause.

Generally, when the OCC seizes an insolvent bank, there is no taking because there is nothing to "take" per se.<sup>88</sup> The very insolvency of the institution leaves the shareholders with no property value, and hence no application of the Fifth Amendment<sup>89</sup> because there is no reason for "just compensation."<sup>90</sup> Furthermore, the government receives no gain from an insolvent institution, but instead must fund depositors from the BIF.<sup>91</sup>

This reasoning, however, cannot be applied to solvent institutions. When the OCC seizes a solvent institution, there may be a corresponding deprivation of property, and therefore the very nature of the Fifth Amendment comes into question because "private property [is] taken for public use, *without just compensation*."<sup>92</sup> Furthermore, the government receives a substantial benefit when it seizes a solvent institution because the government can issue refunds to depositors by utilizing funds within the seized bank instead of the BIF.<sup>93</sup> Therefore, the historical argument

86. 12 U.S.C. § 1821(c)(5) lists a number of discretionary factors under which the OCC can appoint a receiver, regardless of solvency. *See supra* note 49 for a complete list.

87. Historically, the OCC used 12 U.S.C. §§ 93, 191, 481, and 1818 to seize insolvent banks. *See supra* notes 36-81 and accompanying text.

88. The only "taking" that generally occurs is that of physical property, such as office furniture. While this could be substantial, it often has a depreciated value and must not be confused with other assets of a bank and the actual value of that bank to shareholders.

89. U.S. CONST. amend. V.

90. *Id.*

91. In *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), the court upheld the taking of an *insolvent* institution, focusing primarily on the regulation intensive nature of the banking industry. *Id.* at 1076. However, the court noted that, had Golden Pacific been solvent, the argument would rest with a due process issue and not a takings issue. *Id.* at 1075-76. Such logic fails to adequately consider the principles advanced by the three distinct elements of the Takings Clause discussed below. This shortsighted decision-making process, adopted by the courts when dealing with the federal government, is a trend that must end.

92. U.S. CONST. amend. V (emphasis added).

93. Sometimes, however, mismanagement within the OCC and FDIC prevents the

that the seizure of an insolvent institution is a legitimate "taking" is not sound when applied to solvent banks.

Whether a taking has occurred in the general sense is difficult to determine,<sup>94</sup> and within the framework of banking litigation, the issue can be quite nebulous. In *Penn Central Transportation Co. v. New York City*,<sup>95</sup> the Supreme Court addressed the Takings Clause of the Fifth Amendment<sup>96</sup> in light of a New York City statute affecting Grand Central Terminal.<sup>97</sup> The Court noted:

While this Court has recognized that the 'Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than on a few persons.<sup>98</sup>

Disclaimers aside, the Court established three factors in determining whether a taking has occurred: "[1] The economic impact of the regulation on the claimant . . . [2] the extent to which the regulation has interfered with distinct investment-backed expectations . . . and [3] the character of governmental action."<sup>99</sup>

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government from reaping any financial benefit and instead costs taxpayers money. See generally *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127 (10th Cir. 1991) (discussing the possibility of improper regulatory takeover), cert. denied 112 S. Ct. 1475 (1992). But see *Lincoln Sav. and Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990) (exemplifying a clear case for regulatory action).

94. The court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), explained: "The question of what constitutes a 'taking' for purposes of the Fifth amendment has proven to be a problem of considerable difficulty." *Id.* at 123.

95. 438 U.S. 104 (1978).

96. U.S. CONST. amend V.

97. *Penn Cent.*, 438 U.S. at 122.

98. *Id.* at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

99. *Id.* at 124. In an opposing view, Christopher Curtis argued that banks "[o]rganized in corporate or quasi-corporate form . . . are legal persons and not natural persons. As entities, they are legal fictions." Christopher T. Curtis, *The Takings Clause and Regulatory Takeovers of Banks and Thrifts*, 27 HARV. J. ON LEGIS. 375 (1990). Therefore, the approach to takings set out in *Penn Central* would not apply. This is the quintessential issue in deciding whether there is a violation of the Takings Clause. Curtis failed to consider these three factors in light of solvent financial institutions. However, Curtis further argued that "[t]aking over a legal entity is not simple . . . . [T]o determine whether a taking has occurred, one must analyze the effect of the challenged regulatory action on the bundle of rights that make up the legal entity." *Id.* Perhaps this logic hints at Curtis' insight into the possible depth of regulatory action, although Curtis did not consider this in his final analysis.

## 1. Economic Impact

The first factor, economic impact on the claimant,<sup>100</sup> is the most significant factor with respect to solvent financial institutions. In discussing the economic impact factor, the First Circuit in *McAndrews v. Fleet Bank of Massachusetts*<sup>101</sup> noted: "The hallmark of an unconstitutional taking, is . . . the denial of the 'economically viable use of [an owner's] land.'"<sup>102</sup> Furthermore, even statutes based in strong public policy can just as easily result in an invalid "taking" under an economic impact analysis.<sup>103</sup> In these situations it is important to note the expectations of the claimant, the nature of the taking, and the public policy rationale involved.<sup>104</sup>

When the OCC seizes a financial institution, the taking is similar to the one at issue in *McAndrews v. Fleet Bank of Massachusetts*.<sup>105</sup> When a bank becomes insolvent, however, it has theoretically lost any right to the property; it is as if its license to conduct business hinged upon maintaining a certain solvency level. Based on this reasoning, a solvent insti-

100. *Penn Cent.*, 438 U.S. at 124.

101. 989 F.2d 13 (1st Cir. 1993).

102. *Id.* at 18 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); *see also* *United States v. Causby*, 328 U.S. 256, 267 (1946) (holding that airplane flights above claimant's chicken farm were an unconstitutional taking); *Portsmouth Co. v. United States*, 260 U.S. 327, 330 (1922) (holding that the repeated firing of guns on a military base constituted a taking of claimant's land); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that a New York Law requiring landlords to allow television cable companies to install such facilities in their apartment buildings, even though the fixtures occupied less than one and a half cubic feet of property, constituted a taking).

103. *See* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (holding that a Pennsylvania statute making the mining of coal commercially impracticable, but for public policy reasons, was invalid as constituting a taking).

104. The Court in *Penn Central* recognized that:

[I]n a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

*Penn Cent.*, 438 U.S. at 124-25.

105. 989 F.2d 13 (1st Cir. 1993). In *McAndrews*, though, the court addresses only the narrow issue of a terminated lease as a result of the appointment of FDIC as receiver for the bank.



tution should not be penalized in this fashion because it has successfully maintained an adequate level of capital.

When a receiver is appointed for a national bank, the shareholders of that bank lose all use of the institution in addition to the value of their investments.<sup>106</sup> When the OCC seizes an insolvent institution, although the shareholders lose all use and value of the institution, the loss is inconsequential because, in theory, their stock in the bank is worthless. On the other hand, a shareholder of a solvent institution loses significant monetary value, valuable stock, and thus experiences a substantial deprivation of property rights.

## 2. Investment-Backed Expectations

The second factor in determining whether an unconstitutional taking has occurred focuses on the interference with investment-backed expectations.<sup>107</sup> Key to understanding this factor is found in *Pennsylvania Coal Co. v. Mahon*.<sup>108</sup> In *Pennsylvania Coal*, the Supreme Court held that a Pennsylvania statute forbidding mining, which would cause the subsidence of any house, was an unconstitutional taking.<sup>109</sup> The Court reasoned that the Pennsylvania statute rendered the owner of a coal mine unable to mine the coal from land that he owned.<sup>110</sup> While the Court in *Pennsylvania Coal* recognized the important public policy considerations advanced by the statute, the protection of the dwellings, it concluded that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"<sup>111</sup>

In analyzing the nature of the investment-backed expectations of financial institutions, it is critical to examine the regulatory context underlying their very existence.<sup>112</sup> Clearly, any bank owner expects that the

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106. Significant cases on regulatory takings pale in comparison to the seizures of solvent financial institutions. In *Penn Central*, the claimant merely lost an investment opportunity; in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1986), the claimants lost the right to exclude others from a small portion of their property; and in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the claimants lost their property right in continued employment.

107. *Penn Cent.*, 438 U.S. at 124.

108. 260 U.S. 393 (1922).

109. *Id.* at 416.

110. *Id.* at 398.

111. *Penn Cent.*, 438 U.S. at 127 (citing *Pennsylvania Coal*, 260 U.S. 393). The Court in *Penn Central* further added that the statute "had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land." *Id.*; see also *Hudson Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (holding that height restrictions on property constituted an illegal taking).

112. Regarding the rights of a landlord in relation to the termination of a lease

government will closely monitor all activity and that a seizure may occur should the institution become insolvent.<sup>113</sup> However, the nature of FDICIA transcends any reasonable bounds of expectancy because no shareholders of a solvent institution would ever expect the instantaneous appointment of a receiver due to "discretionary" factors<sup>114</sup> determined solely at the whim of the OCC.<sup>115</sup> Perhaps bank executives should expect such regulatory action in the event their financial institutions show a consistent loss and are bordering on insolvency. However, this is not the case when a solvent bank consistently makes a profit at the end of each quarter.

If the bottom-line is to protect the BIF and the stability of the FDIC, the regulatory authority under FDICIA is even more unjustifiable. A profitable bank certainly does not drain the insurance fund because, by definition, an institution with a positive net worth will have sufficient assets to pay off depositors if a liquidation is necessary. Absent the need to take a solvent bank in the interests of preserving FDIC funds, the OCC should have no other authority to take a solvent bank at all.<sup>116</sup> For this reason, there is no way to characterize this particular taking other than as unconstitutional.

### 3. Character of the Government Action

The third and final factor is the character of the government action.<sup>117</sup> The most important issue involving this factor is whether the government uses the property for its own means.<sup>118</sup> In *McAndrews*, the court explains that the taking of appellant's property under FIRREA was not unconstitutional, but was merely an illustration of how the regulation "reallocate[s] pluses and minuses," and that "Congress routinely creates

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upon appointment of the FDIC as receiver for a bank, the court in *McAndrews*, explains that "[t]hose who deal with firms in regulated industries must expect that their dealings will from time to time be affected by statutory and regulatory changes." *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 19 (1st Cir. 1993).

113. See 12 U.S.C. § 191 (1990), amended by 12 U.S.C. § 191 (1993).

114. See 12 U.S.C. § 1821(c)(5) (1993).

115. The OCC, once again, is held to an arbitrary and capricious standard of review. See *supra* note 35.

116. In *Penn Central*, the Court explains in dicta that an act may constitute an unconstitutional taking if it is "not reasonably necessary to the effectuation of a substantial public purpose." *Penn Cent.*, 438 U.S. at 127.

117. *Id.* at 124.

118. *Id.*

burdens for some that directly benefit others."<sup>119</sup> In the context of solvent institutions, however, the issue is reallocation and the extent of government balancing.<sup>120</sup> Because there is no need to protect taxpayers from solvent banks, only the government benefits.<sup>121</sup>

Some may argue that the government is not appropriating any value for itself when it takes over an institution under the guise of regulatory authority.<sup>122</sup> When the institution is solvent, however, the government is never obligated to refund proceeds above the deposits.<sup>123</sup> Instead, the government might apply such funds to further insure the FDIC against any future bank failures, especially those flirting with insolvency.<sup>124</sup> Ultimately, the government's action serves governmental interests exclusively, and hence the taking of a solvent institution amounts to an unconstitutional taking.

#### 4. Conclusion

In *Lucas v. South Carolina Coastal Council*,<sup>125</sup> the Supreme Court discussed the scope of the Takings Clause<sup>126</sup> in light of the *Pennsylvania Coal*<sup>127</sup> decision. The Court noted:

Justice Holmes recognized in *Mahon* . . . that if the protection against physical ap-

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119. *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 19 (1st Cir. 1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).

120. In *United States v. Causby*, 328 U.S. 256 (1946), the Court balanced direct flights above plaintiff's land with the need for the flights and found a taking. *Id.* at 261-62.

121. Commenting on the *Causby* decision, the court in *Penn Central* explained that "Causby emphasized that Government had not 'merely destroyed property [but was] using a part of it for the flight of its planes.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. at 104, 128 (1978) (quoting *Causby*, 328 U.S. at 262-63).

122. Under the guise of FIRREA, this argument is made by Curtis, *supra* note 99, at 381. Curtis compares a regulatory seizure to a bankruptcy proceeding where the bankruptcy court seeks to preserve some value for debt holders. *Id.* In such a bankruptcy proceeding, therefore, the government does not generally protect its own interests but, instead, the interests of others. *Id.*

123. Under FDICIA, the government protects the insurance fund and the financial strength of the FDIC, which, although indirectly benefitting taxpayers, provides a direct benefit to the government.

124. This argument is analogous to that of justiciability and taxpayer standing. The Supreme Court has consistently held that federal taxpayers lack standing to challenge unconstitutional federal expenditures because the injury is too remote. *See generally* *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Frothingham v. Mellon*, 262 U.S. 447 (1923). Hence, taxpayers cannot refuse to pay taxes. Their only potential recourse is to find a federal expenditure made pursuant to the spending clause is in violation of the constitution.

125. 112 S. Ct. 2886 (1992).

126. U.S. CONST. amend. V.

127. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

propriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits . . . . If instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." . . . These considerations gave birth . . . to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>128</sup>

The over-regulated nature of the banking industry unfortunately often clouds the real constitutional issues.<sup>129</sup> Congress and the regulators may lose sight of the direct and unlawful violations involving the institutions which they regulate, occurring virtually on a daily basis.<sup>130</sup> Therefore, it is necessary to reexamine<sup>131</sup> all regulations that exist unchecked by judicial scrutiny. With solvent banks especially, the uncompensated taking under FDICIA is an example of an egregious constitutional violation.

### B. Procedural Due Process

In 1991 Congress passed FDICIA,<sup>132</sup> which substantially modified the text of section 191.<sup>133</sup> By passing FDICIA, Congress intended to create a "system of prompt regulatory action . . . premised on the realization . . . that the longer an insolvent [or solvent] insured depository institution is allowed to remain open, the more it will ultimately cost to resolve the institution."<sup>134</sup>

The sweeping nature of the 1991 FDICIA amendments, however, denies federal institutions procedural due process.<sup>135</sup> While FDICIA affords

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128. *Lucas*, 112 S. Ct. at 2892-93 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

129. The real constitutional issues relate to the Fifth and Fourteenth Amendments.

130. In a discussion on basic takings, the Court in *Lucas* explains that, in the case of permanent deprivations, the Court has "refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved." *Id.* at 2900.

131. The courts should reexamine the takings issues, not in light of banking regulations, but instead, in light of the Constitution.

132. Pub. L. No. 102-242, 105 Stat. 2236 (1991).

133. See *supra* notes 51-53 and accompanying text.

134. Pub. L. 102-242, 1991 U.S.C.C.A.N. 1916 (1991).

135. In a May 1993 report, the Administrative Conference of the United States argued that "[b]anks and thrifts should have an appeals process to go through to dispute examinations findings, and there should be an opportunity for judicial review of final banking agency decisions in this area." *ACUS Calls for Bank Exam Appeals Process and Judicial Review of Agency Decisions*, BUREAU OF NAT'L AFFAIRS, INC.

procedural protections following the dismissal of executive officers,<sup>136</sup> the reclassification<sup>137</sup> of an institution based on supervisory criteria other than capital,<sup>138</sup> the execution of a cease and desist order,<sup>139</sup> and the

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BANKING DAILY, June 22, 1993, at 1. When an institution becomes insolvent, federal regulators justify a prompt takeover without notice as a preventive measure to avoid a run on the institution. As exemplified by recent bank failures, however, the BIF has been fully capable of covering such deposits on the various failed institutions. Therefore, Congress' strong regulatory actions not only violate the Constitution's due process provisions, but they are completely unnecessary. In the last few decades, the agencies have committed to an archaic practice without any concern for the protection of the banks. Furthermore, there is virtually no need for prompt action without notice with solvent banks. By definition, these solvent banks have even less of a chance of burdening the insurance fund. Although the bank regulators must keep a watchful eye on all banks to ensure that even the most solvent of banks maintain their solvency, the Constitution must be preserved.

136. 12 U.S.C. § 1831o(n)(1) (1993). This section states that "[a] director or senior executive officer [of a bank] dismissed pursuant to an order . . . may obtain review of that order by filing a written petition for reinstatement with the appropriate Federal banking agency." *Id.*

137. This Comment does not discuss in great detail the technical nature of capital reclassification and subsequent prompt corrective action. For further examination of the topic, see the full text of 12 C.F.R. §§ 6.1-6.25 and 12 U.S.C. § 1831o (1993). *See also* S. Rep. No. 167, 102d Cong., 1st Sess. (1991) (addressing the various provisions of Prompt Corrective Action legislation). The following table summarizes the capital levels for the four capitalization categories:

PCA CAPITAL	TOTAL	TIER 1	TIER 1
CATEGORY	RISK-BASED RATIO	RISK-BASED RATIO	LEVERAGE RATIO
Well-Capitalized	≥10.0%	≥6.0%	≥5.0%
Adequately Capitalized	≥8.0%	≥4.0%	≥4.0%
Under-Capitalized	<8.0%	<4.0%	<4.0%
Significantly Under	<6.0%	<3.0%	<3.0%

Fed. Banking L. Rep. (CCH) ¶ 60,520XX (Banking Cir. 268 Feb. 25, 1993).

138. 12 C.F.R. § 6.4 (1993). This section states that "[t]he OCC may reclassify a well capitalized bank as adequately capitalized and may require an adequately capitalized . . . bank to comply with certain mandatory or discretionary supervisory actions" when the OCC has made its determinations "*after notice and opportunity for hearing . . .*" *Id.* (emphasis added). This section is especially significant as it applies directly to solvent institutions that are reclassified from well-capitalized to adequately capitalized or from adequately capitalized to undercapitalized. According to the plain language of the code, such a reclassification requires notice and a hearing.

139. 12 U.S.C. § 1818(b) (1993) (requiring a notice or "hearing . . . not earlier than

termination of an institution's status as insured by the FDIC,<sup>140</sup> no such constitutional safeguards exist for receiverships under section 191.<sup>141</sup> The lack of constitutional safeguards must be remedied by either Congress or the courts.<sup>142</sup>

The various sections of Title 12 lack procedural due process safeguards when the OCC appoints the FDIC receiver for a national bank.<sup>143</sup> In addition, the provisions of FDICIA differ significantly from the pre-amended sections.<sup>144</sup> Congress has systematically undermined the Constitution by taking advantage of a marginally effective statute<sup>145</sup> and reconstructing it into an outright violation<sup>146</sup> which usurps significant constitutional protections.<sup>147</sup> Therefore, the final determination of its constitutionality is evident through an analysis of existing case law.<sup>148</sup>

### 1. Case Law

Historically, the Supreme Court established that Congress did not have the authority to legislate against constitutional protections. In *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>149</sup> the Court stated:

It is manifest that it was not left to the legislative power to enact any process

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thirty days nor later than sixty days after service of such notice").

140. Under section 1818(a)(2)(B), the FDIC has the authority:

[W]ith respect to an insured depository institution [if the FDIC] determines that any unsafe or unsound practice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall (i) *serve written notice* to the [bank] of the Board's intention to terminate . . . (ii) provide the [bank] with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made . . . and (iii) *notify the [bank] of the date . . . and place for a hearing* before the Board of Directors . . . with respect to the termination of the institution's insured status.

12 U.S.C. § 1818(a)(2)(B) (1993) (emphasis added).

141. See 12 U.S.C. § 191 (1993). In fact, no constitutional protections exist at all.

142. See *supra* note 135 and accompanying text for a discussion of the need for Congress to amend 12 U.S.C. § 191 to provide for judicial review.

143. See 12 U.S.C. § 191 (1993).

144. See *supra* notes 48-62 and accompanying text.

145. 12 U.S.C. § 191 (1991), amended by 12 U.S.C. § 191 (1993).

146. 12 U.S.C. § 191 (1993).

147. Specifically, the fifth and fourteenth amendments are impacted. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

148. If a national bank brings an action against the OCC, the constitutionality of the FDICIA provisions will be a question of first impression.

149. 59 U.S. (18 How.) 272 (1855).

which might be devised. The article [5th amendment] is a restraint on the legislative as well as the executive and judicial powers of government, and cannot be so construed as to leave congress free to make any process "due process of law" by its mere will.<sup>150</sup>

In 1877, the Court, in *Davidson v. New Orleans*,<sup>151</sup> further elaborated on the due process clause:

[W]hen . . . there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty, or property without due process of law" can a State make any thing due process of law which, by its own legislation, it chooses to declare such?<sup>152</sup>

Based upon these statements, it appears that the Supreme Court intended to enforce the due process guarantees of the Constitution. This inherent check on federal and state legislation has always been a critical element in protecting the various constitutional safeguards. However, the historical orations above resolves few issues in the framework of federal banking regulation and, therefore, whether section 191 is a violation of such constitutional amendments remains an issue.<sup>153</sup>

Modern decisions regarding procedural due process have slightly switched their rhetoric from the ethereal to the practical. In *Board of Regents of State Colleges v. Roth*<sup>154</sup> the Supreme Court noted: "When protected interests are implicated the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite."<sup>155</sup> In *Roth*, the Court emphasized the need for significant procedural due process safeguards, but indicated that there are limitations to the protections afforded certain interests. This case

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150. *Id.* at 276.

151. 96 U.S. 97 (1877).

152. *Id.* at 102. The court answered "no." *Id.*

153. The courts are split, if not opposed, to providing judicial review to some decisions of the OCC. This unfortunate trend should be reversed. A 1992 Practicing Law Institute article summarized the courts' positions:

The Statutes authorizing the Comptroller of the Currency to appoint a receiver for a national bank contain no provision for judicial review. Given the absence of any express review provision and the broad discretionary language of the appointment statutes, some courts have concluded that the determination of the Comptroller to appoint a receiver is not judicially reviewable. Other courts have concluded that the appointment . . . is judicially reviewable under the arbitrary or capricious test. . . . The Tenth Circuit recently declined to state a position on reviewability.

Paul W. Grace, *Regulatory Seizure of Banks and Thrifts*, April 15, 1992, PLI COMM. L. & PRACTICE COURSE HANDBOOK SERIES 616/177 (1992).

154. 408 U.S. 564 (1972).

155. *Id.* at 569-70. The Court further added that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72.

does not resolve whether this limitation extends into the realm of banking regulations.

The Supreme Court critically examined the issues of procedural due process in *Fuentes v. Shevin*.<sup>156</sup> In *Fuentes*, the Court reviewed the constitutionality of Florida and Pennsylvania replevin statutes that authorized the seizure of goods under a writ of replevin without notice or any opportunity to challenge the seizure.<sup>157</sup> Fuentes had purchased a stove from Firestone Tire and Rubber Co. and agreed to make monthly payments for a set period of time.<sup>158</sup> With only a couple of hundred dollars in payments left, Fuentes disputed the terms of the service contract relating to the stove.<sup>159</sup> In response, Firestone filed a small-claims action against her.<sup>160</sup> Yet, before Fuentes had received the complaint, Firestone obtained a replevin order<sup>161</sup> requiring a sheriff to retrieve the merchandise in question from Fuentes.<sup>162</sup>

The Pennsylvania statute went one step further. Not only did the statute fail to provide that the party seeking the writ "even formally allege that he is lawfully entitled to the property,"<sup>163</sup> but there was no required post-seizure hearing.<sup>164</sup>

In deciding the issues of the case, the Court proclaimed: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"<sup>165</sup> The Court focuses on the fundamental right of a person to be heard, not as a guaranteed victory, but instead as a promise that fairness and justice will prevail.<sup>166</sup> "[F]airness can rarely be obtained by [a] se-

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156. 407 U.S. 67 (1972).

157. The Florida statute provided that "[a]ny person whose goods or chattels were wrongfully detained by any other person . . . may have a writ of replevin to recover them . . . ." *Id.* at 73 (quoting FLA. STAT. ANN. § 78.01 (West 1973)).

158. *Id.* at 70.

159. *Id.*

160. *Id.*

161. *Id.* The form which Firestone needed to complete was extremely simple, and the very day that the court processed the replevin order, a sheriff seized the merchandise from Fuentes. *Id.* at 71.

162. The Court notes: "There is no requirement that the applicant make a convincing showing before the seizure . . . . Rather, Florida law automatically relies on the bare assertion of the party seeking the writ . . . ." *Id.* at 73-74.

163. *Id.* at 78.

164. *Id.*

165. *Id.* at 80 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)).

166. The Court added that the purpose of the due process clause



cret, one-sided determination of facts,"<sup>167</sup> the Court concluded, and hence, the critical need to protect procedural due process.

In addition, the *Fuentes* Court noted:

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented . . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.<sup>168</sup>

In light of the above background, whether the receivership provisions of FDICIA<sup>169</sup> are constitutional is clear: They are not. Regarding insolvent institutions, the staple argument of the regulators has been that the lack of procedural due process is fundamental to protect the public interest.<sup>170</sup> Even *Fuentes* implies support for this notion in theory: "Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest."<sup>171</sup>

The ultimate issue regarding national bank receiverships, however, is whether such action is constitutionally necessary.<sup>172</sup> With a myriad of other procedures available to the banking regulators, placing a bank in receivership should be a last resort.<sup>173</sup> Incidentally, each successive regulatory procedure, leading up to receiverships, provides for procedural due process. Whether it be the removal of a bank officer,<sup>174</sup> a cease and desist order,<sup>175</sup> a capital reclassification order,<sup>176</sup> or the removal of

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is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

*Id.* at 80-81.

167. *Id.* at 81.

168. *Id.* at 81-82.

169. 12 U.S.C. § 191 (1993).

170. See *supra* note 135 and accompanying text.

171. *Fuentes*, 407 U.S. at 90-91. Furthermore, the Court explains: "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." *Id.* at 90 n.22.

172. This issue will be discussed in greater detail in Part IV of this Comment under the review of the arbitrary and capricious standard.

173. See *supra* notes 136-40 and accompanying text.

174. See *supra* note 136.

175. See *supra* note 139.

176. See *supra* note 137.

FDIC insured status,<sup>177</sup> FDICIA provides for some due process protection. Therefore, the question is why such a drastic measure, arguably more severe than any other provision in FDICIA, exists without a scintilla of constitutional protection.

The government argues such provisions are "necessary to secure an important governmental or general public interest."<sup>178</sup> Preventing a run on a bank, the government argues, merits the denial of procedural due process.<sup>179</sup> However, depositors may become just as alarmed at the news of a cease and desist order, the removal of the bank's chairman of the board, or even the bank's reclassification. An article in a local newspaper discussing the impending hearing on capital reclassification may draw the media or just as many depositors to an institution as coverage of a receivership. Therefore, this proverbial "bank run" argument is unconvincing.

The next issue involves solvent financial institutions. Arguably, it is never imperative to seize these banks under the guise of the public interest. Solvent banks pose no threat to the insurance fund and certainly pose no greater threat to depositors.<sup>180</sup> Furthermore, the solvent nature of such a bank favors the argument that other methods are more effective.<sup>181</sup>

177. See *supra* note 140.

178. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). In *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1988), the Court noted: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240.

179. The Banking Act of 1933 gave rise to this argument:

When banks started failing in large numbers, depositors lost not only their funds, but all confidence in the banking system as well. Not surprisingly, many accountholders withdrew their deposits from institutions which remained open. The Federal Reserve could not meet the sudden demand for cash by these institutions, and many of them also had to close. To stop the panic bank runs and to restore depositor confidence, Congress decided to insure depositor's accounts.

Fed. Deposit Ins. Corp. Improvement Act of 1991; Pub. L. 102-242, 1991 U.S.C.C.A.N. 1901, 1902.

180. Regarding insolvent banks, for example, in *Gregory v. Mitchell*, 459 F. Supp. 1162 (N.D. Ala. 1978), the district court noted: "Summary seizure of a bank . . . without a prior hearing has been approved by many courts, including the Supreme Court of the United States, on the ground such action is justified by the potential economic disaster of a bank failure." *Id.* at 1165-66.

181. With solvent banks, there is no pending economic disaster which is about to produce disastrous effects on the insurance fund. There was never an impending economic disaster when regulators seized American Commerce National Bank. After

If insolvency is not at issue in the course of bank examinations, then clearly some management or internal practice is the problem.<sup>182</sup> Therefore, FDICIA provides plenty of remedies to regulate practices which the OCC alleges are violations of banking laws. For example, the OCC can reclassify even a "well-capitalized" bank as "adequately capitalized" for discretionary reasons.<sup>183</sup> This process requires notice and a hearing.<sup>184</sup>

Hence, as applied to solvent banks, and arguably even to insolvent banks, the public need mentioned in *Fuentes* does not outweigh the constitutional protections afforded to these financial institutions.<sup>185</sup> Furthermore, in a regulatory seizure of a solvent financial institution, millions of shareholders' dollars may be at stake. These interests must be taken into account when the OCC seizes a solvent bank. Therefore, there are two separate levels of protection: the bank and the shareholders. Whether one entity deserves a higher level of protection is an important issue, but since neither entity receives the necessary constitutional safeguards, this must be addressed first.

The Supreme Court articulated a fundamental precept of due process in *Cleveland Board of Education v. Loudermill*.<sup>186</sup> In that case the Court declared: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"<sup>187</sup> The nature of a

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the regulators seized the bank, however, a mini-economic disaster occurred in Orange County: Hundreds of small businesses were virtually shut down for the weekend, and a number of construction loans were terminated, thereby adversely affecting the local building industry in the midst of a disastrous recession. See generally Johnson, *supra* note 4, at D1. One construction firm, because of the frozen construction loans, released seventy-five employees the following week. *Id.* The FDIC allowed the sale of only \$107,000,000 of bank deposits, thereby depriving 328 families of approximately \$30,000,000, even though the bank was solvent. *Id.* The FDIC sold to Southern California Bank only the insured deposits, the amount up to \$100,000. *Id.* Therefore, depositors with accounts in excess of \$100,000 had to contend with Southern California Bank for the initial amount, and the FDIC for the excess amounts. *Id.* Finally, the FDIC selectively chose which creditors to pay, and only paid such creditors sixty cents on the dollar, even though the bank had been solvent. *Id.*

182. The OCC seized American Commerce National Bank on the various grounds of 12 U.S.C. § 1821(c)(5), which applied to internal mismanagement but not to insolvency. Therefore, the OCC used its discretionary authority to allege certain illegal practices by bank management and seized the institution.

183. See *supra* note 137.

184. See *supra* note 137.

185. See *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

186. 470 U.S. 532 (1985).

187. *Id.* at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 313 (1950)); see also *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (holding that the consideration of procedural due process "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action");

bank regulatory seizure must allow some protection for the shareholders of a solvent bank. As FDICIA now stands, no protection exists, and judicial recourse is virtually impossible.<sup>188</sup>

In *Woods v. Federal Home Loan Bank Board*,<sup>189</sup> the Fifth Circuit focused on the adequacy of both pre- and post-deprivation procedures in determining whether a bank regulatory seizure afforded the proper protections of due process.<sup>190</sup> The court, agreeing with plaintiff's argument that "the absence of pre-deprivation process heightens the need for post-deprivation procedures,"<sup>191</sup> balanced the competing interests between the two parties.<sup>192</sup> On the one hand, the government insures deposits of such institutions, and congressional legislation addresses the need to preserve confidence in the system through strong regulation.<sup>193</sup> On the other hand, the private interests of shareholders in solvent financial institutions must be protected under the Constitution.

The court in *Woods* held that the various interests were inferior to the interests mentioned in *Fuentes*.<sup>194</sup> In *Fuentes*, the limited interest involved replevin statutes that authorized the seizure of goods under a writ of replevin without notice or any opportunity to challenge the seizure.<sup>195</sup> In *Woods*, however, the bank was insolvent.<sup>196</sup> Furthermore, the court in

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*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) ("Determining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards.").

188. See *infra* notes 215-35 and accompanying text.

189. 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

190. The court noted: "The exceptionally strong government interest in administering FSLIC insurance and the unique statutory position occupied by the Bank Board which requires no pre-deprivation hearing combine to present us with the reverse of the situation found in most procedural due process cases." *Id.* at 1411.

191. *Id.*

192. *Id.*

193. In *Fahey v. Mallonee*, 332 U.S. 245 (1947), the Court noted: "Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators." *Id.* at 250.

194. *Woods*, 826 F.2d at 1411; see *supra* notes 149-52 and accompanying text.

195. *Fuentes v. Shevin*, 407 U.S. 67, 73 (1972).

196. In *Branch v. Federal Deposit Insurance Corp.*, 825 F. Supp. 384 (D. Mass.

*Woods* notes that there was no surprise to the plaintiffs: "Not only was there a formal cease and desist proceeding, but also these same plaintiffs filed the initial action in this case in June 1986, some three months before the Bank Board appointed the receiver."<sup>197</sup>

Under a typical section 191 scenario, the institution seized can be both solvent and completely unaware of the pending receivership.<sup>198</sup> The court in *Woods* did not address this possibility, but regarding future situations, the court advised: "What due process may require 'in dealing with one set of interests which it protects may not be required in dealing with another set of interests.'"<sup>199</sup> Section 191 of FDICIA<sup>200</sup> addresses an entirely different "set of interests" than the courts have yet addressed. Therefore, the acceptance of the receivership statutes in *Woods*<sup>201</sup> must not be confused by the courts as approval of FDICIA. A comparison between the interests in *Woods* and those under FDICIA yield virtually no similarities.

Another case somewhat mirroring the logic of FDICIA is *Franklin Savings Association v. Office of Thrift Supervision*.<sup>202</sup> In *Franklin*, the Tenth Circuit reversed a district court decision placing the bank back into the hands of its old directors.<sup>203</sup> The court of appeal dismissed the bank's argument that the action by the Office of Thrift Supervision failed to provide procedural due process. The court noted: "[Title 12] affords the association to which a conservator has been appointed the opportunity for judicial review of the appointment decision. The availability of this post-deprivation hearing precludes any due process violations."<sup>204</sup>

This logic offers no substantial guidance to courts in reviewing FDICIA's receivership statutes.<sup>205</sup> The court in *Franklin* justified no pre-conservatorship hearing because of the presence of judicial review of a previous administrative decision.<sup>206</sup> In theory, this might be an ample solution to any questionable seizure of a national bank; however, in practice such logic is troubling. If a solvent bank is seized on a Friday and sold the following Monday, irreparable harm could ensue.<sup>207</sup> Thereafter,

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1993), the court held that the OCC can appoint a receiver for any national bank when the bank becomes insolvent. There is no mention of solvent banks. *Id.* at 391.

197. *Woods*, 826 F.2d at 1412.

198. See 12 U.S.C. § 191 (1993).

199. *Woods*, 826 F.2d at 1410-11 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974)).

200. See 12 U.S.C. § 191 (1993).

201. *Woods*, 826 F.2d at 1413.

202. 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

203. *Id.* at 1140.

204. *Id.*

205. See 12 U.S.C. § 191 (1993).

206. *Franklin*, 934 F.2d at 1140.

207. American Commerce National Bank was seized on a Friday and sold the fol-

at the very least, shareholder interest would be eliminated and depositor confidence might vanish virtually overnight. Fearing a future takeover or some other regulatory measure, even if the receivership were removed, few depositors would cease to be concerned.

Therefore, no judicial review, not even by the Supreme Court of the United States, could remedy the situation and return the bank to its pre-receivership conditions. While there may be claims against the government or other parties, this remedy pales in comparison to the damage done. Hence, judicial review of an administrative agency's decision simply does not work in practice, and the logic of the *Franklin* court likewise fails.

While section 191 does not provide for judicial review, the statute does not prohibit such review;<sup>208</sup> it is certainly within the discretion of the courts to correct this constitutional violation. In *Federal Deposit Insurance Corporation v. Bank of Coughatta*,<sup>209</sup> the Fifth Circuit discussed the review procedures for capital directives and the applicable Fifth Amendment due process considerations. The court noted: "[I]n the absence of an express prohibition, there is a 'strong presumption that Congress did not mean to prohibit all judicial review of [the] decision.'"<sup>210</sup> Perhaps the courts will begin to reexamine their interpretation of FDICIA's receivership sections and the unchecked authority granted to federal regulatory agencies.

In summary, 12 U.S.C. § 191 is unconstitutional as a violation of procedural due process. Because the courts have yet to decide the issue of national bank receiverships in the context of solvent banks, case law provides an opportunity for where the courts can begin.<sup>211</sup>

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lowing Monday to Southern California Bank. See Johnson, *supra* note 4, at D1.

208. See 12 U.S.C. § 191 (1993).

209. 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 170 (1991).

210. *Id.* at 1128 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). Furthermore, the court in *Dunlop* noted: "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Dunlop*, 421 U.S. at 567 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967)).

211. Even the OCC is unable to decide how § 191 applies to solvent national banks. While the OCC seized American Commerce National Bank, a solvent bank, under the grounds mentioned in 12 U.S.C. §§ 191 and 1821(c)(5), a February 25, 1993, circular produced by the Comptroller of the Currency clouds the issue whether such statutes apply to solvent banks. Here, the Comptroller lists the grounds for the appointment of a receiver under the general heading of "Capital Restoration Plan" that applies to undercapitalized and insolvent institutions. While the intent of the

Although there has been no definitive resolution of procedural due process issues, the Administrative Conference of the United States has made recommendations regarding section 191.<sup>212</sup> In particular, the Conference states: "Congress should amend section 2 of the National Bank Receivership Act, 12 U.S.C. 191, to provide for judicial review of decisions to appoint receivers for national banks."<sup>213</sup> Although this is not an authoritative decision, it does lend significant weight to the argument that something must be done regarding FDICIA's receivership sections. The constitutional violations relating to national banks must be addressed by legislation, and if not, then by the courts.<sup>214</sup>

#### IV. THE STANDARD OF REVIEW FOR OCC DECISIONS

In general, one standard of review, the arbitrary and capricious standard, applies to the bank regulators upon creation of receiverships for any national bank.<sup>215</sup> In *Franklin*, the court established "an appointment decision may be set aside only if the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"<sup>216</sup> Due to the discretionary nature of the grounds listed in section

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Comptroller is clear, the OCC has nevertheless interpreted that section of the text to apply to virtually any institution, regardless of solvency. The ambiguities between the interpretations of the regulations by the Comptroller of the Currency and by the actual federal agents must be resolved. *See* Fed. Banking L. Rep. (CCH) ¶ 60,520XX (Banking Cir. 268 Feb. 25, 1993).

212. *See supra* note 135 and accompanying text.

213. 58 Fed. Reg. 45, 412 (1993).

214. "[T]he central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)).

215. While the arbitrary and capricious standard of review is almost universally employed, courts will occasionally apply another. *See, e.g.,* *Telegraph Sav. and Loan Ass'n. v. Federal Sav. and Loan Ins. Corp.*, 564 F. Supp. 880 (N.D. Ill. 1982), *aff'd*, 703 F.2d 1019 (7th Cir.) (applying a greater weight of the evidence standard), *cert. denied*, 464 U.S. 992 (1983).

216. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1142, *cert. denied*, 112 S. Ct. 1475 (1992) (quoting 5 U.S.C. § 706(2)(A)); *see also* *Syracuse Peace Council v. Federal Communications Comm'n*, 867 F.2d 654, 657 (D.C. Cir. 1989) (holding the F.C.C. to an arbitrary and capricious standard of review), *cert. denied*, 493 U.S. 1019 (1990); *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1406 (5th Cir. 1987) (holding that a receiver may be appointed under the proper arbitrary and capricious standard of review), *cert. denied*, 485 U.S. 959 (1988); *Gregory v. Mitchell*, 459 F. Supp. 1162, 1166 (N.D. Ala. 1978) (holding the State Banking Board to an arbitrary and capricious standard of review). Furthermore, the court in *Franklin* noted that "the scope of review is ordinarily limited to the agency record before the director at the time he made his decision." *Id.*

1821(c)(5)<sup>217</sup> that warrant the appointment of receiverships, there is something inherently wrong with this standard of review. While this Comment does not attempt to tackle the standard of review for administrative agencies in general, this level of review raises significant issues as applied to the OCC and as documented by various "suspect" takeovers.

In *Franklin*, the court noted some instances when administrative agency decisions may be overturned:

[W]e must uphold the agency's actions, findings, and conclusions unless they are: outside the agency's statutory authority; unsupported by substantial evidence; found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to a constitutional right or privilege; without observance of required procedure; or unwarranted by the facts to the extent the facts are subject to a trial de novo by the reviewing court.<sup>218</sup>

In *Franklin*, as in most court decisions, the reviewing appellate court deferred to the administrative record rather than the independent fact-findings of the district court.<sup>219</sup> The seemingly impossible burden of reversing OCC decisions is troubling. Recognizing a significant shortcoming in federal regulation of national banks, Congress increased the OCC's power at the expense of others' constitutional rights.<sup>220</sup>

The United States Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>221</sup> spoke about the dangers of government agents: "An agent acting - albeit unconstitutionally - in the

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217. See *supra* note 49 and accompanying text.

218. *Franklin*, 934 F.2d at 1142. See also *United States v. Carlo Bianchi and Co.*, 373 U.S. 709, 715 (1963) ("[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held."). Finally, the *Franklin* court noted: "A reviewing court may not substitute its judgment for that of the agency." *Franklin*, 934 F.2d at 1142.

219. *Id.* at 1142; see also *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1406 (5th Cir. 1987) (holding that consideration is to be confined to the administrative record), *cert. denied*, 485 U.S. 959 (1992); *Lincoln Sav. and Loan Ass'n v. Wall*, 743 F. Supp. 901, 905 (D.D.C. 1990) (holding that "review requires judicial deference to the agency's judgment").

220. The Prompt Corrective Action came about because Congress was "concerned that regulators have too often delayed in resolving the problems of troubled institutions." S. Rep. No. 167, 102d Cong., 1st Sess. (1991). In his report to the Senate Banking, Housing, and Urban Affairs Committee, economist James Barth stated: "[T]he regulatory authorities have the power, have had the power, do have the power, and will have the power to do their job. That's why, unfortunately, I don't think that they've done a good job . . . [Congress] must require that they do their job." *Id.*

221. 403 U.S. 388 (1971).



name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."<sup>222</sup> Unfortunately, these words fit the OCC when its seemingly unchecked authority runs awry.<sup>223</sup> After all, when the agency seizes a national bank, acts as the judge, jury, prosecuting attorney, and defense attorney.

An unfortunate "Catch-22" situation exists in the gray area surrounding OCC authority and national bank autonomy. National banks have very little means to challenge decisions of the OCC. It does not take a bank chairman or president very long to realize this and that a governmental agency must be treated in the most obsequious manner. In addition, banks already subject to the discretionary decisions of the OCC can, at most, muster an "arbitrary and capricious" defense.<sup>224</sup>

First City Bancorporation of Texas, Inc. filed a complaint against the FDIC on September 24, 1993, alleging that the OCC and FDIC's receiver-ship appointment was "wrongful, unlawful, and done in egregious and reckless disregard for the rights of those banks, and of their shareholders, creditors, and depositors."<sup>225</sup> American Commerce National Bank has also filed a complaint against the OCC and other authorities alleging similar wrongdoing.<sup>226</sup>

The fight between such national banks and the OCC, however, extends beyond simple court cases;<sup>227</sup> the battle often becomes quite personal. After regulators seized American Commerce National Bank, the OCC launched a mini-media campaign to justify its actions.<sup>228</sup> The OCC al-

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222. *Id.* at 392.

223. In an article on bank regulation, Elizabeth Costle, Commissioner of the Vermont Department of Banking, Insurance and Securities stated: "Banks are more regulated than . . . their entities. And, I would say, that regulators have gone too far." *Where Do Banks Go From Here?*, VERMONT BUSINESS MAGAZINE, Dec. 1992, at 22.

224. See *supra* note 35 and accompanying text.

225. Complaint for Plaintiffs at 15, *First City Bancorp. of Tex., Inc. v. Federal Deposit Ins. Corp.*, No. 4:93cv242 (E.D. Tex., September 24, 1993). Ultimately, the FDIC settled this case with First City Bankcorp. of Texas.

226. See generally Complaint for Plaintiffs, *Garner v. Blake*, No. CV 93-6674 MRP (C.D. Cal. Dec. 8, 1993).

227. The battles are often very expensive. A recent study by the Federal Financial Institutions Examination Council ("FFIEC") has revealed that the regulatory burden on the banking industry is more than \$17.5 billion a year in compliance costs. The report also notes that "[o]verly detailed regulation can create inefficiencies by preventing the institutions themselves from responding appropriately to regulatory requirements and changing conditions." *Regulatory Compliance Costs Banks \$17.5 Billion a Year*, FFIEC Study Says, 12 No. 1 BANKING POL'Y REP. 4 (1993).

228. The OCC sent numerous releases to the press. The OCC also posted a notice on the bank door the day of the seizure explaining the nature of its actions. This explanation described the seizure in terms of the actions of the bank directors, specifically the chairman of the board. Though the notice arguably was defamatory in nature, the government is immune from such torts under the Federal Tort Claims

leged insider abuse and concealment of records. Among other things, the OCC decided it must put the bank "in receivership - rather than try to conserve its loans, investments and other assets - because the 'pervasive concealment and falsification of bank records' made it impossible to determine the extent of the bank's unsafe and unsound condition."<sup>229</sup>

One article stated the events of April 30, 1993 occurred as follows: "[T]he OCC sent 100 bank regulators to the American Commerce National Bank in Anaheim, locked its doors and bodily tossed out its officers and directors. The bank cowboys smashed all logos and emblems of the bank. Directors' pictures were broken."<sup>230</sup>

The battle between the OCC and American Commerce National Bank is as interesting as it is tragic. Allegations of personal vendettas<sup>231</sup> and anti-semitism against the board of directors<sup>232</sup> are pitted against the crimes of concealing records and lying to government regulators.<sup>233</sup> Unfortunately, while such a fight may ultimately reach the judicial system, the directors and shareholders of the bank do not enjoy a level playing field. Held to an arbitrary and capricious standard of review, national banks must first prove bad faith on the part of the regulators before a court will even hear their claims of abuse, not to mention the underlying constitutional issues.

For American Commerce National Bank, the bad faith argument may prevail. However, with a plethora of options that would have essentially eliminated any problems,<sup>234</sup> the OCC decided instead to wield its most potent weapon: a receivership.<sup>235</sup> Perhaps the best argument for American Commerce National Bank is that 12 U.S.C. §§ 191 and 1821(c)(5) apply only to insolvent and undercapitalized institutions and therefore the OCC's decision to apply such statutes to the bank was arbitrary.

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Act. See Federal Tort Claims Act of 1946, ch. 753, Title IV, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

229. See Granelli, *supra* note 1, at D3.

230. Herb Brin, *Bank "Cowboys" Anti-Semitic*, ORANGE COUNTY HERITAGE, Sept. 24, 1993, at 1.

231. According to a sworn affidavit, OCC agents approached a bank customer and told him they would relieve his loan obligations if he could provide any incriminating evidence against American Commerce National Bank. Complaint for Plaintiffs at 12, *Garner v. Blake*, No. CV 93-6674 MRP (C.D. Cal. Dec. 8, 1993).

232. See generally *id.*

233. See generally Statement of Uncontroverted Facts by Defendants, *Garner v. Blake*, No. CV 93-6674 MRP (C.D. Cal. March 14, 1994).

234. See *supra* notes 136-40 and accompanying text.

235. 12 U.S.C. § 191 (1993).

In a court of law, American Commerce National Bank must systematically disprove each allegation under 12 U.S.C. 1821(c)(5), according to the aforementioned standard of review. With such a difficult task and the fact that the OCC is in complete control of all bank records as of April 30, 1993, it is no wonder that few banks actually challenge the decisions of the agency.

## V. CONCLUSION

Well then, as I was saying, perhaps the insatiable desire for [liberty] . . . to the neglect of everything else may transform a democracy and lead to a demand for despotism. A democratic state may fall under the influence of unprincipled leaders, ready to minister to its thirst for liberty with too deep draughts of this heady win.<sup>236</sup>

[T]he culmination of liberty in democracy is precisely what prepares the way for the cruelest extreme of servitude under a despot.<sup>237</sup>

The regulatory seizure of American Commerce National Bank, and other small national banks, inevitably leads to a chilling affect in the industry. With federal charters and civil money penalties at stake, bank officers and directors are reluctant to run the risk of agitating an agent from the OCC, FDIC, or other regulatory agency.<sup>238</sup> The punishment, however, often falls on the customer. In the final analysis, customer service may have a lower priority than regulatory compliance.

According to David Robertson, "[t]he general rule in this country is that you can't go out and seize people's property without going to court first and giving the person a hearing."<sup>239</sup> Regarding FDICIA, common

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236. PLATO, THE REPUBLIC 288 (Francis MacDonald Cornford trans., 1941).

237. *Id.* at 290.

238. For those bank officers who actually oppose the regulatory agencies, the story can be tragic:

In his last days, just before Thanksgiving 1992, Scott Cone had become sad, even tearful. He was also frightened, sure that the FBI was following him and tapping his phone. Cone had been chief financial officer for Landmark Land Co. . . . But Landmark had been taken over by federal regulators . . . . Cone, 39 years old, was jobless in a deepening recession and banned for life from banking. He owed his defense lawyers an overwhelming sum, and he was also alone, having divorced his wife of 18 years, Debby, to distance his family from his mounting personal and professional problems.

... The Sunday night before Thanksgiving, Scott Cone took the family's shotgun, put it to his head, and pulled the trigger. He left no note for his wife and two children, but the source of his despair was clear. He was wearing a T-shirt some Landmark employees had made up in a moment of defiance against the government. It had RTC printed on it, circled and slashed through in red.

Dickenson, *supra* note 15, at 93.

239. Sharon Walsh, *Long Reach of S&L Regulators Shakes Law Firms*, WASH. POST.,

sense and logic leads to the conclusion that it is unconstitutional. However, the trend has been to allow government intervention whenever the government deems it necessary. At stake are billions of dollars in taxpayer money. Superficially, it is difficult to argue that the rights of one individual financial institution outweigh the rights of taxpayers.

However, also at stake are the constitutional safeguards afforded these national banks, their shareholders and customers. Such fundamental rights apply to all taxpayers, not just those connected with a solvent financial institution. This historical avenue for government mismanagement and over-zealous regulation must be terminated. FDICIA has gone too far with its grandiose legislative intent to save the banking industry. FDICIA in certain contexts may be viewed as the problem, not the solution.

CRAIG BOYD GARNER<sup>240</sup>

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Mar. 30, 1992, at A1. Mr. Robertson chaired a New York Bar Association committee that looked into the constitutional issues raised by the government's use of asset freezing powers. See Crawford, *supra* note 22, at 205 n.1.

240. The author is a student at Pepperdine University School of Law. The author's father, Gerald Garner, was the Chairman of the Board at American Commerce National Bank.

